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Supreme Court, U.S.
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No. 00-1336

In the
Supreme Court of the United States

KENNETH KING,

Petitioner,

v.

STATE OF OHIO,

Respondent,

On Petition For Writ of Certiorari
To The Supreme Court of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether substantial, as opposed to strict, compliance with a deeply rooted hearsay exception for the statements of young children in abuse situations violates a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment?

2. Whether the appointment of a guardian *ad litem* for a minor witness, the invocation by that guardian *ad litem* of the privilege against self-incrimination on behalf of that minor witness, and the exclusion of that minor witness from appearing in open court simply to invoke his privilege against self-incriminating in front of the jury violates a criminal defendant's rights under the Compulsory Process Clause of the Sixth Amendment?

3. Whether alleged mistakes on the part of trial counsel and the hearing impairment of lead trial counsel, which were not prejudicial to the outcome of the case, violate a criminal defendant's right to effective assistance of counsel under the Sixth Amendment?

4. Whether alleged constitutional errors in admitting or excluding evidence concerning the identity of the perpetrator of certain criminal sex offenses were harmless beyond a reasonable doubt, where DNA evidence was introduced which conclusively identified the criminal defendant on trial as the perpetrator of those offenses?

PARTIES TO THE PROCEEDING

Petitioner

Kenneth King, an individual with no corporate affiliations.

Respondent

The State of Ohio.

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OPINIONS BELOW

The Ohio Court of Appeals for the Ninth Judicial District affirmed the trial court's judgment of conviction in an unreported decision. (*See* Appendix A). The Supreme Court of Ohio declined jurisdiction in State v. King (2000), 90 Ohio St.3d 1428, 736 N.E.2d 25, and later denied a motion for reconsideration in State v. King (2000), 90 Ohio St.3d 1474, 738 N.E.2d 384 .

JURISDICTION

The Supreme Court of Ohio entered its judgement declining jurisdiction on October 4, 2000. State v. King (2000), 90 Ohio St.3d 1428, 736 N.E.2d 25. The Supreme Court of Ohio denied Petitioner's motion for reconsideration on November 22, 2000. State v. King (2000), 90 Ohio St.3d 1474, 738 N.E.2d 384. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND EVIDENCE RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

> liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article I, Section 10 of the Ohio Constitution provides, in relevant part, that:

> * * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the

> trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself * * *.

Ohio Evid.R. 803, which sets forth hearsay exceptions where the availability of the declarant is immaterial, states in relevant parts that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.
>
> (2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> * * *
>
> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof

insofar as reasonably pertinent to diagnosis or treatment. * * *

Ohio Evid.R. 807, which sets forth the hearsay exception for the statements of young children in abuse situations, states that:

> (A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:
>
> (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making

this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.

* * *

(C) The court shall make the findings required by this rule on the basis of a hearing conducted

outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

STATEMENT OF THE CASE

On November 20, 1997, the Medina County, Ohio Grand Jury returned a two count indictment charging Petitioner Kenneth King (hereinafter "Petitioner") with one count of rape in violation of Ohio Revised Code § 2907.02 and one count of gross sexual imposition in violation of Ohio Revised Code § 2907.05. The victim as to both counts was a young girl identified as "Y.E." who was four years old at the time of the offenses.

On January 5, 1998, the Medina County Grand Jury returned another two count indictment charging Petitioner with one count of rape in violation of Ohio Revised Code § 2907.02 and one count of gross sexual imposition in violation of Ohio Revised Code § 2907.05. The victim as to both counts was another young girl identified as "D.A." who was four years old at the time of the offenses, which took place some 12-to-18 months prior to the offenses against Y.E. The circumstances of Petitioner's offenses against D.A. were virtually identical to his offenses against Y.E. The case was resolved without a trial by Petitioner pleading guilty to sexual battery in violation of Ohio Revised Code § 2907.03(A)(5) and to gross sexual imposition in violation of Ohio Revised Code § 2907.05(A)(4) on February 3, 1999. He was subsequently sentenced to a total prison term of four years as to those offenses. Petitioner did not appeal from his convictions and sentences in that case.

With regard to the instant case, Y.E. was one of the children cared for by Petitioner's wife at her day care center

located at the King residence in the City of Wadsworth, Medina County, Ohio. On the afternoon of Friday, May 25, 1997, while he was briefly alone with Y.E., Petitioner performed oral sex on the four year old girl, touched her vaginal area with his penis, and ejaculated on her.

On Saturday morning, May 26, 1997, Y.E. revealed to her mother, Colleen Spangle, what Petitioner had done to her the previous afternoon. Y.E. identified Petitioner by his first name "Kenny." Ms. Spangle and her friend, Joanne Reber, then took Y.E. to meet with both Det. Warren Walter of the Medina County Sheriff's Department and Ms. Joan Selby, a licensed social worker employed by the Medina County Department of Human Services. In a videotaped interview with Det. Walter and Ms. Selby, Y.E. again disclosed what Petitioner had done to her. During the car ride home that afternoon, Y.E. made additional disclosures to Ms. Spangle and Ms. Reber.

Ms. Spangle took Y.E. to Dr. Suzanne LeSure, Ph.D., a licensed clinical psychologist who treats both victims and perpetrators of sexual abuse, for treatment and counseling at her offices in Medina, Ohio. During the course of their sessions, Dr. LeSure noted that Y.E.'s mannerisms, her behavior in wearing layers of clothing on a hot summer day, her developmentally-appropriate language and her description of the events at Petitoner's residence on May 25, 1997, were all consistent with that of a young child who had been sexually abused.

Ms. Spangle turned over the clothing that Y.E. had been wearing on the afternoon of May 25, 1997 to the Medina County Sheriff's Department, including Y.E.'s panties. Laboratory tests performed on Y.E.'s panties at the Ohio Bureau of Criminal Identification and Investigation (BCI&I) in Richfield, Ohio, revealed the presence of semen therein. DNA

tests on Y.E.'s panties were subsequently conducted at Cellmark Laboratories in Germantown, Maryland. Comparisons made between the DNA found in the semen from Y.E.'s panties, and blood samples obtained from both Petitioner and Y.E., indicated that Petitioner could not be excluded as the primary source of that semen. Dr. Charlotte Word-a doctor of molecular biology and Assistant Director of Cellmark Laboratories-testified at Petitioner's trial that one would expect to find the same genetic material in the semen from Y.E.'s panties in only 1 out of every 82 million caucasian males. Petitioner himself is a caucasian male.

Petitioner nonetheless denied committing the sex offenses against Y.E. , and alleged that his teenaged step-nephew, "B.R.", was the perpetrator. However, Y.E. never identified anyone other than Petitioner as the perpetrator.

A jury trial was held from August 12, 1998 through August 25, 1998 before the Honorable James L. Kimbler, Judge of the Medina County Court of Common Pleas. Petitioner was present in court and represented by trial counsel, Dennis E. Paul and David A. Shively. The State of Ohio was represented by David C. Sheldon and Frank A. Raso, Assistant Medina County Prosecuting Attorneys.

The State introduced testimony from the following witnesses concerning Y.E.'s disclosures of sexual abuse by Petitioner: Dr. LeSure, the treating clinical psychologist; Ms. Spangle, Y.E.'s mother; Ms. Reber, a friend of Ms. Spangle; and Ms. Selby, the social worker who first interviewed Y.E. The trial court allowed the State to introduce the video tape of Ms. Selby's interview with Y.E., because Y.E. herself was unable to testify at trial that Petitioner committed the charged offenses. Pursuant to Ohio Evid.R. 404(B), the trial court also allowed the State to introduce testimony from both D.A.'s mother and Dr. LeSure, who was counseling both Y.E. and D.A.,

concerning Petitioner's previous offenses against D.A. in order to establish the identity of the perpetrator in the instant case. The State further introduced the aforementioned DNA evidence, which conclusively identified Petitioner as the source of the semen found in Y.E.'s panties.

Petitioner sought to have B.R. testify at trial. However, B.R. invoked his Fifth Amendment privilege against self-incrimination through his guardian *ad litem*. Petitioner then sought to have B.R.'s psychologist, Dr. Ann Carden, testify to admissions which B.R. made to her. Although B.R.'s mother had waived his psychologist-patient privilege prior to the trial in order to allow Dr. Carden to reveal B.R.'s privileged statements to Petitioner's defense counsel, the trial court allowed B.R., through his guardian *ad litem*, to assert his psychologist-patient privilege and prevent Dr. Carden from testifying at trial.

On August 25, 1998, the jury returned verdicts of guilty as to both counts set forth in the indictment. Petitioner was subsequently sentenced to a total prison term of nine years. Petitioner directly appealed his conviction in the instant case. On May 31, 2000, the Ohio Court of Appeals for the Ninth Judicial District overruled Petitioner's four assignments of error and affirmed his conviction. (*See* Appendix A). On October 4, 2000, the Supreme Court of Ohio declined jurisdiction. On November 22, 2000, the Supreme Court of Ohio denied Petitioner's motion for reconsideration.

REASONS FOR DENYING THE PETITION

I. **Petitioner's rights under the Confrontation Clause of the Sixth Amendment were *not* violated.**

In Idaho v. Wright, 497 U.S. 805, 818, 110 S.Ct. 3139, 3148, 111 L.Ed.2d 638 (1990), this Court held that the admission of certain hearsay statements made by a child declarant to an examining pediatrician violated the criminal defendant's rights under the Confrontation Clause of the Sixth Amendment, where those statements were not admitted pursuant to a "firmly rooted" hearsay exception and did not bear "particularized guarantees of trustworthiness." The Idaho trial court had not admitted the child's statements under the firmly rooted hearsay exception for statements made for medical diagnosis or treatment, but rather under a residual hearsay exception for "statement[s] not specifically covered by any of the foregoing [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness * * *." Id. at 812, 110 S.Ct. at 3144-45.

This Court went on to state that:

> We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.
>
> * * *
>
> As our discussion above suggests, we are unpersuaded by the State's contention that

> evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness.' To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.

Id. at 820-22, 110 S.Ct. at 3149-50.

Following this Court's decision in Idaho v. Wright, supra, the State of Ohio adopted Evid.R. 807 which recognizes a hearsay exception for the statements of young children in abuse situations. Ohio Evid.R. 807 accords with right of confrontation of witnesses guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. State v. Storch, 66 Ohio St.3d 280, court's syllabus at one, 612 N.E.2d 305 (1993).

Ohio Evid. R. 807(A) establishes four requirements for admission: (1) the statement must be trustworthy, (2) the child's testimony must be unavailable, (3) independent proof of the act must exist, and (4) the proponent must notify all other parties ten days before trial that such a statement will be offered in evidence. In addition, there are age and subject matter requirements: the child must be under 12 years old and the statement must relate to an act of sexual abuse or physical violence. Pursuant to Ohio Evid.R. 807(C), the trial court must also make findings of fact to support its general findings with respect to the four requirements of Ohio Evid.R. 807(A). State v. Said, 71 Ohio St.3d 473, 477-78, 644 N.E.2d 337, 341 (1994).

In the instant case, the trial court determined that Y.E., who was six years old at the time of trial, was competent to testify following an examination of Y.E. out of the presence of the jury. However, when she was subsequently called as a witness by the State of Ohio to testify in open court, Y.E. refused to testify about any matters relevant to this criminal case. Y.E. was then excused. Due to Y.E.'s unexpected refusal to testify, the State of Ohio informed both the trial court and defense counsel that it would seek to introduce the video taped interview of Y.E., which was conducted by Ms. Selby on May 26, 1997, into evidence pursuant to Ohio Evid.R. 807.

It is undisputed that Y.E. was under the age of 12 years old and that her videotaped interview by Ms. Selby related to acts of sexual abuse. Having directly observed Y.E.'s refusal to testify, the trial court made the specific determination on the record, pursuant to Ohio Evid.R. 807(A)(2), that the child's testimony was not reasonably obtainable. The trial court also determined on the record, pursuant to Ohio Evid.R. 807(A)(3), that there was independent proof of the sexual act in the form of DNA evidence. After viewing the videotaped interview out of the presence of the jury, the trial court made the further determination on the record, pursuant to Ohio Evid.R. 807(A)(1), that the statements made by Y.E. to Ms. Selby on that videotape were at least as reliable as statements admitted under Ohio Evid.R. 803 and 804. The videotaped interview took place less than twenty-four hours after the sexual offenses occurred and, thus, Y.E.'s statements to Ms. Selby would otherwise have been admissible under Ohio Evid.R. 803(1) and/or Ohio Evid.R. 803(2) as a present sense impression or an excited utterance.

The State admittedly did not comply with the ten-day notification requirement of Ohio Evid.R. 807(A)(4), because it intended to present direct testimony at trial from Y.E. herself. However, the State listed that videotaped interview in the

pretrial discovery materials provided to Petitioner. Moreover, the trial court, as well as both parties, viewed the videotape on the evening before the trial court actually ruled on its admissibility into evidence. As noted in the decision of the Ninth District Court of Appeals, Petitioner did not move for a continuance or aver that he needed additional time to prepare to rebut that videotape. (*See* Appendix A at p. 9a). Thus, Petitioner was not prejudiced by the State's failure to strictly comply with the ten-day notice requirement of Ohio Evid.R. 807(A)(4).

Because there was substantial compliance with the requirements of Ohio Evid.R. 807 prior to the trial court's admission of the videotaped interview into evidence, Petitioner's rights under the Confrontation Clause of the Sixth Amendment were not violated. His Petition for Writ of Certiorari should therefore be denied.

II. Petitioner's rights under the Compulsory Process Clause of the Sixth Amendment were *not* violated.

Petitioner's trial strategy was to shift blame away from himself to his teenage step-nephew, B.R., by claiming that B.R. was the perpetrator of the sex offenses against Y.E. To this end, Petitioner called B.R. as a defense witness. Although Petitioner could not compel B.R. to waive his Fifth Amendment privilege against self-incrimination, B.R.'s mother–who was also Petitioner's sister-in-law–wanted B.R. to testify at trial. Petitioner now claims that the trial court erred by appointing a guardian *ad litem* for B.R. and by permitting that guardian at litem to invoke B.R.'s privilege against self-incrimination.

The Fifth Amendment privilege against self-incrimination is applicable in any proceeding civil or criminal,

formal or informal, where the answers might incriminate the witness in future criminal proceedings. Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). The privilege is applicable to, and may be exercised by, juveniles as well as adults. In re Gault, 387 U.S. 1, 55, 87 S.Ct. 1428, 1458, 18 L.Ed.2d 527. (1967).

Petitioner does not cite any authority whatsoever to support his proposition that "as his mother and legal guardian, [B.R.'s mother] had the unfettered right to invoke or waive any and all rights which her son may have pursuant to the United States (and/or Ohio) Constitution." (*See* Petition for Writ of Certiorari at 23). To the contrary, it is well settled that the constitutional privilege against self-incrimination is a personal one which cannot be exercised by third parties. United States v. Nobles, 422 U.S. 225, 233, 95 S.Ct. 2160, 2167, 45 L.Ed.2d 141 (1975); and Couch v. United States, 409 U.S. 322, 328, 93 S.Ct. 611, 616, 34 L.Ed.2d 548 (1973).

There is no Ohio case which has held that a parent could waive a constitutional right of a minor child in a juvenile or criminal case. In re Collins, 20 Ohio App.2d 319, 321-22, 253 N.E.2d 824 , 826-27 (1969); *see also* In re Doyle, 122 Ohio App.3d 767, 771-72, 702 N.E.2d 970, 973 (1997); and In re East, 105 Ohio App.3d 221, 224-25, 663 N.E.2d 983, 985 (1995). Indeed, courts in other jurisdictions have held that, where the interests of a parent and minor child concerning the exercise or waiver of a testimonial privilege do not coincide, a guardian *ad litem* should be appointed to act on behalf of the minor child. *See* State ex rel. Wilfong v. Schaeperkoetter, 933 S.W.2d 407, (Mo. 1996); State v. S.H., 159 Wis.2d 730, 465 N.W.2d 238 (1990); and Nagle v. Hooks, 296 Md. 123, 460 A.2d 49 (1983).

In the instant case, the trial court properly appointed a guardian *ad litem* to act on B.R.'s behalf when it appeared that B.R.'s mother was not acting in his best interests, but rather in

the interests of her brother-in-law the Petitioner. It was clearly in B.R.'s best interests to assert his Fifth Amendment privilege against self-incrimination, where Petitioner was attempting to falsely blame him for the sex offenses perpetrated against Y.E.

Petitioner next claims that the trial court erred and abused its discretion by excluding B.R. from appearing in open court as a witness on Petitioner's behalf, after the guardian *ad litem* asserted B.R.'s privilege against self-incrimination in the judge's chambers. However, Petitioner's reliance on State v. Dinsio, 176 Ohio St. 460, 200 N.E.2d 471 (1964), and Columbus v. Cooper, 49 Ohio St.3d 42, 550 N.E.2d 937 (1990), is misplaced.

The Supreme Court of Ohio has more recently held that a trial court may exclude a person from appearing as a witness on behalf of a criminal defendant at trial if the court determines that the witness will not offer any testimony, but merely intends to assert the Fifth Amendment privilege against self-incrimination. State v. Kirk, 72 Ohio St.3d 564, court's syllabus at one, 651 N.E.2d 981 (1995) (distinguishing and limiting Columbus v. Cooper, supra). The exclusion of such a witness does not violate the Compulsory Process Clause. Kirk, supra. Thus, a criminal defendant does not have a right to place a witness on the stand for the sole purpose of having him assert his Fifth Amendment privilege in front of the jury. Kirk, supra at 569, 651 N.E.2d at 984.[1]

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[1] *See also* United States v. Arnott, 704 F.2d 322 (6th Cir. 1983); United States v. Johnson, 488 F.2d 1206 (1st Cir., 1973); United States v. Beye, 445 F.2d 1037 (9th Cir., 1971); and Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), certiorari denied (1971), 401 U.S. 995, 91 S.Ct. 1240, 28 L.Ed.2d 533.

The trial court did not err by appointing a guardian at litem, by permitting that guardian *ad litem* to invoke B.R.'s privilege against self-incrimination, or by excluding B.R. from appearing in open court for the sole purpose of having him assert his Fifth Amendment privilege in front of the jury. Because Petitioner's rights under the Compulsory Process Clause were not violated, his Petition for Writ of Certiorari should be denied.

III. Petitioner was *not* denied effective assistance of counsel as guaranteed under the Sixth Amendment.

The Sixth Amendment right to counsel is the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). To establish a claim of ineffective assistance of counsel, a convicted defendant must demonstrate (1) that counsel's performance was deficient, in that it fell below an objective standard of reasonable representation, and (2) that he was prejudiced by counsel's deficient performance. Strickland, supra at 687-88, 104 S.Ct. at 2064; State v. Bradley, 42 Ohio St. 3d 136, 538 N.E.2d 373 (1989), cert. denied, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768.

The proper standard for reviewing attorney performance is that of reasonably effective assistance. Strickland at 687-88, 104 S.Ct. at 2064. There is a strong presumption that counsel's performance was effective. Id. at 689, 104 S.Ct. at 2065; *see also* Bradley, supra at 142, 538 N.E.2d at 379-80. Because there are countless ways to provide such effective assistance, judicial scrutiny of counsel's performance must be highly deferential- every effort must be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate that conduct from counsel's perspective at the time. Id. A

convicted defendant must overcome the presumption that the alleged errors of counsel "might be considered sound trial strategy." Strickland, supra at 689, 104 S.Ct. at 2065.

With regard to the required showing of prejudice, the proper standard is that the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, supra at 694-95, 104 S.Ct. at 2068-69. In making this determination, a reviewing court must consider the totality of the evidence that was before the trier of fact. Id.

Petitioner alleges that he was denied effective assistance of counsel on four separate grounds. First, Petitioner claims that trial counsel was ineffective for not objecting to the inclusion of testimony from Dr. LeSure, the treating clinical psychologist for both Y.E. and D.A., without first ascertaining whether Y.E. and D.A. were unavailable to testify or whether there was any other hearsay exception available. However, under Ohio Evid.R. 803(4) which sets forth the firmly rooted hearsay exception for statements made for purpose of medical diagnosis or treatment, the availability of the declarant is immaterial. State v. Dever, 64 Ohio St.3d 401, 416-18, 596 N.E.2d 436, 448-49 (1992), cert. denied 507 U.S. 919, 113 S.Ct. 1279, 122 L.Ed.2d 672; citing White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). Statements made by a young child to a clinical psychologist during therapy fall within the meaning of "medical treatment" under Ohio Evid.R. 803(4). State v. Vaugn 106 Ohio App.3d 7775, 780-81, 667 N.E.2d 82, 85-86 (1995); and State v. Kelly, 93 Ohio App.3d 257, 264-65, 638 N.E.2d 153, 158 (1994). Thus, trial counsel was not deficient for failing to object to Dr. LeSure's testimony, and Petitioner was not prejudiced by trial counsel's failure to object.

Second, Petitioner claims that trial counsel was ineffective for failing to specifically object to the prosecution's failure to strictly comply with the formal ten-day written notification requirement of Ohio Evid.R. 807(A)(4), prior to the admission of Ms. Selby's videotaped interview with Y.E. However, trial counsel was made aware of the video tape in question during pretrial discovery well in advance of trial. Petitioner did not request a continuance or aver that he needed additional time to prepare to rebut that videotape. Thus, Petitioner was not prejudiced by the prosecution's failure to strictly comply with Ohio Evid.R. 807(A)(4).

Third, Petitioner claims that lead trial counsel, Dennis E. Paul, was ineffective in trying this case due to his hearing impairment. However, Petitioner was cognizant of Mr. Paul's hearing impairment prior to trial when he retained Mr. Paul as his attorney. The trial court made reasonable accommodations for Mr. Paul by allowing him to sit close to the witness stand throughout trial. Mr. Paul was also assisted at trial by co-counsel David A. Shively, an experienced trial attorney whose sense of hearing was fine. Therefore, Petitioner cannot demonstrate any prejudice arising from lead trial counsel's hearing impairment. *See* Sorensen v. State, 6 P.3d 657 (Wyo. 2000) (denying an ineffective assistance of counsel claim premised on the failure of counsel to secure removal of a hearing-impaired juror).

Fourth, Petitioner claims that trial counsel was ineffective for failing to raise on direct appeal the alleged error by the trial court in admitting, pursuant to Ohio Evid.R. 803(2) which sets forth the firmly rooted hearsay exception for excited utterances, testimony from D.A.'s mother concerning statements made by D.A. identifying Petitioner as the perpetrator of the sex offenses against her. However, as previously noted, D.A.'s statements were also admitted pursuant to Ohio Evid.R. 803(4) through the testimony of Dr.

LeSure. Therefore, Petitioner cannot demonstrate any prejudice arising from either the testimony of D.A.'s mother or from trial counsel's failure to raise this evidentiary issue on direct appeal.

Because no prejudice resulted from the allegedly deficient performance of trial counsel, Petitioner was not denied effective assistance of counsel as guaranteed under the Sixth Amendment. Therefore, his Petition for Writ of Certiorari should be denied.

IV. The alleged constitutional errors raised by Petitioner were harmless, given the conclusive DNA evidence presented by the State of Ohio.

Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

Applying the constitutional harmless error rule of Chapman, supra, in Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), this Court held that error in admitting the confessions of two non-testifying co-defendants into evidence at trial, in violation of the petitioner's rights under the Confrontation Clause of the Sixth Amendment, was harmless beyond a reasonable doubt due to the incriminating testimony presented by a third co-defendant and petitioner's own incriminating admissions.

In the instant case, the essential element in dispute at trial was the identity of the perpetrator of the sex offenses against Y.E. However, the DNA evidence introduced by the State conclusively established that Petitioner, a caucasian male, was the source of the semen found in Y.E.'s panties. One

would expect to find that same genetic material in only 1 out of every 82 million caucasian males. Standing alone, this DNA evidence was sufficient to identify Petitioner as the perpetrator of the sex offenses against Y.E. beyond any reasonable doubt.

Thus, any alleged constitutional error on the part of the trial court in admitting the video tape of Ms. Selby's interview with Y.E., pursuant to Ohio Evid.R. 807, to establish the element of identity was harmless beyond a reasonable doubt.[2] Any alleged constitutional error on the part of the trial court in appointing a guardian *ad litem* for B.R., permitting that guardian *ad litem* to invoke B.R.'s privilege against self-incrimination, and excluding B.R. from appearing in open court simply to invoke his privilege in front of the jury was also harmless beyond a reasonable doubt. Finally, any alleged constitutional error on the part of the trial court in admitting testimony from Dr. LeSure, pursuant to Ohio Evid.R. 803(4), concerning Y.E's and D.A.'s respective identification of Petitioner as the perpetrator of the nearly identical sex offenses against them, and in admitting further testimony from D.A.'s mother, pursuant to Ohio Evid.R. 803(2), concerning D.A.'s identification of Petitioner, was harmless beyond a reasonable doubt.

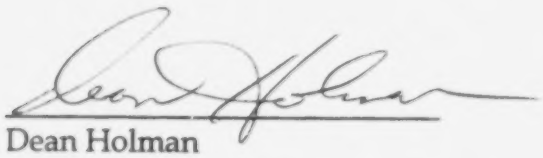
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[2] *See* Larson v. Nutt, 34 F.3d 647, 648 (8th Cir. 1994).

CONCLUSION

Based on the foregoing, the State of Ohio respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

[Filed May 31, 2000]

C.A. No. 2963-M

STATE OF OHIO
COUNTY OF MEDINA

STATE OF OHIO
Appellee

v.

KENNETH D. KING
Appellant.

APPEAL FROM JUDGMENT ENTERED
IN THE COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE NO. 97-CR-0368

DECISION AND JOURNAL ENTRY

Dated: May 31, 2000

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

Appellant, Kenneth King, appeals his conviction in the Medina County Court of Common Pleas. We affirm.

I.

On November 20, 1997, the Medina County Grand Jury indicted Mr. King on one count of rape, in violation of R.C. 2907.02, and one count of gross sexual imposition in violation of R.C. 2907.05. He was indicted for committing those crimes on a young girl named "Y.E." who was under thirteen years of age at the time of the abuse.

Mr. King was separately indicted by the Medina County Grand Jury on January 5, 1998, for rape and gross sexual imposition of another young girl by the name of "D.A." The case involving D.A. was resolved by Mr. King pleading guilty to gross sexual imposition, in violation of R.C. 2907.05(A)(4), and sexual battery, in violation of R.C. 2907.03(A)(5), on February 3, 1999, and is not currently before this court.

A trial was held concerning the abuse of Y.E., commencing on August 12, 1998, in which evidence of Mr. King's abuse of D.A. was admitted over Mr. King's objection. The trial court also allowed the state to show a videotaped interview of Y.E. conducted by Joan Selby because Y.E. was unable to testify at trial that Mr. King committed the crime charged. Mr. King sought, by way of defense, to have a young

boy named "B.R." testify that he, rather than Mr. King,

committed the crimes. However, B.R. refused to testify based upon his Fifth Amendment rights. Mr. King then sought to have Dr. Ann Carden, B.R.'s psychologist testify that B.R. had admitted to Dr. Carden doing the acts for which Mr. King was being tried. However, although B.R.'s mother had waived the psychologist-patient privilege at one point, and hence, Dr. Carden had disclosed B.R.'s statements to Mr. King's defense counsel, the trial court allowed B.R. to assert the psychologist-patient privilege and ruled that Dr. Carden could not testify. Mr. King also sought to call Dr. Sandra McPherson as an expert to testify regarding the interview procedures used on D.A. The trial court ruled that, as her testimony was offered on surrebuttal, it was beyond the scope of the state's evidence on rebuttal and was inadmissible. The state also presented DNA evidence from samples of semen taken from Y.E.'s underwear that were shown to match Mr. King's DNA. In a verdict journalized on August 25, 1998, the jury convicted Mr. King of rape and gross sexual imposition. Mr. King was sentenced accordingly. This appeal followed.

II.

Mr. King asserts four assignments of error. We will address each in due course, consolidating the second and fourth to facilitate review.

A.

First Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY VIOLATING APPELLANT'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION, BY IMPROPERLY ADMITTING HEARSAY TESTIMONY UNDER EVID.R. 807

Mr. King argues that by admitting the videotaped interview of Y.E. without making the necessary findings under Evid.R.807, the trial court violated Evid. R. 807 and his right to confront his accuser under the Ohio and United States Constitutions. We disagree.

"'The trial court has broad discretion in the admission * * * of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, [an appellate] court should be slow to interfere.'" (First alteration in original.) *State v. Maurer* (1984), 15 Ohio St.3d239, 265, quoting *State v. Hammer*(1967) 9 Ohio St.2d 122, 128. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St. 3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.* Moreover, a new

trial should not be granted unless the accused was prejudiced or may have been prejudiced by the evidence improperly admitted. R.C. 2945.83(C)

Evid.R.807 accords with the Confrontation Clause of the Sixth Amendment to the United States Constitution. *State v. Storch* (1993), 66 Ohio St. 3d 280, paragraph one of the syllabus.

Evid. R. 807 codifies when hearsay statements made by an abused child are admissible. Avatar 807 states, in relevant part:

> (A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R.802 if all of the following apply:
>
> (1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its

determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elect, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act of physical violence.

(4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

> (B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2) of this rule only if one or more of the following apply:
>
> (1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify.
>
> * * *

In *State v. Said* (1994), 71 Ohio St.3d 473, 477, the Ohio Supreme Court interpreted Evid. R. 807, stating that

> (b)y its own terms, Evid. R. 807 provides what a trial court must find on the record. First, a trial must find "that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness * * *." Evid. R. 807(A)(1). Second, a trial court must find that "[t]he child's testimony is not reasonable obtainable by the proponent of the statement." Evid. R. 807(A)(2). Third, a trial court must find "independent proof of the sexual act or act of physical violence. "Evid. R. 807(A)(3). Finally, a trial court must find that the proponent of the statement fulfilled the notice requirements under Evid. R. 807(A)(4).

> Evid. R. 807(c) also requires a trial court to make findings of fact to support each of the general findings.

However, "[f]indings in the form of skeletal conclusions are inadequate under Evid. R. 807[.]" *Said*, 71 Ohio St.3d at478.

In the instant case, the trial court concluded that the statements made by Y.E. were at least as trustworthy as the exceptions to the hearsay rule under Evid. R. 803 and 804. The trial court based its conclusion on Y.E.'s testimony, the statements Y.E. made on the videotape, and the testimony of Officer Warren Walter, who filmed Joan Selby's interview with Y.E. The testimony in this case showed that there was little lapse of time between the incident and Y.E.'s statements concerning the abuse during the videotaped interview with Joan Selby. Moreover, among other things, Y.E.'s statements showed a knowledge beyond that which would be expected of a child of her age and a lack of motive to fabricate. Furthermore, Mr. King did not raise a specific objection to the trial court's findings under Evid. R. 807(a)(1). Unlike the trial court in Said, the trial court below based its decision on the totality of the testimony that had been adduced up to that point in the trial. Hence, based upon this record, we cannot conclude that the trial court abused its discretion by finding that the requirements of Evid. R. 807(a)(1) were fulfilled.[3]

---

[3] Mr. King did not challenge the constutionality of Evid. R. 807 or the trial court's application of Evid. R. 807 in the trial court. Hence, Mr. King['s assignment of error as it pertains to the Confrontation Clause of the Sixth Amendment to the United States Constitution was not passed upon by the trial court and is not properly before this court.

Mr. King also argues that the trial court erred by failing to require the state to give ten days notice to him prior to trial pursuant to Evid. R. 807(A)(4). The state had planned to call Y.E. in person, and in fact did so. Y.E. , however, was unable to testify about the incident involving Mr. King when she was called to the witness stand. At that point, the state sought to introduce the videotape of Y.E.'s statements to Joan Selby. Mr. King did not move for a continuance, or aver that the needed additional time to prepare to rebut the videotaped testimony and did in fact rebut the testimony in his own case in chief. Hence, we conclude that the trial court did not err to Mr. King's prejudice by admitting the videotaped testimony of Y.E. without the state having given Mr. King ten days notice of its intent to utilized such evidence prior to trial. Mr. King's first assignment of error is overruled.

B.

Second Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT THE OPPORTUNITY TO CALL DR. ANN CARDEN TO DELIVER EXCULPATORY EVIDENCE AND TESTIMONY WHICH SUPPORTED THAT A JUVENILE NAMED "B.R." COMMITTED THE ALLEGED OFFENSE(S) AND WAS WITH THE ALLEGED VICTIM THE DAY BEFORE AND DAY OF THE ALLEGED OFFENSE(S).

Fourth Assignment of Error

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT THE OPPORTUNITY TO CALL DR. SANDRA MCPHERSON TO DELIVER EVIDENCE REGARDING THE IMPROPER INVESTIGATORY METHODS UTILIZED BY THE STATE'S EXPERT, DR. LESURE, AND REGARDING THE SUBSTANTIAL RISK OF MIS-FOCUSED OR MISTAKEN IDENTITY INHERENT WITH DR. LESURE'S INTERVIEW PROTOCOL.

Mr. King argues that the trial court erred when it allowed B.R. to invoke the psychologist-patient privilege through a court appointed guardian ad litem after his mother had waived the privilege. Furthermore, Mr. King argues that the trial court erred when it ruled that Dr. McPherson, his expert on interrogation protocol in abused children could not testify on surrebuttal. We disagree.

"The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency. "*Pons v. Ohio State Medical Bd.* (1993), 66 Ohio St. 3d. 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgement for that of the trial court. *Id.*

B.R.'s mother admitted to the trial court that a conflict of interest might exist between her interests and those of her son. At that point, the trial court indicated that it might be appropriate for a guardian *ad litem* to be appointed to protect B.R.'s interests, as is required by R.C. 2151.28 1(A)(2) when a conflict of interest is present. The Medina County Court of Common Pleas, Juvenile Division, appointed B.R.'s attorney as his guardian ad litem, pursuant to R.C. 2151.28 (A)(2), due to the admitted conflict of interest with his mother. B.R.'s guardian ad litem then asserted the psychologist-patient privilege before the trial court, pursuant to R.C. 2317.02(B)(1). Hence, we cannot conclude that the trial court abused its discretion by excluding Dr. Carden's testimony based upon B.R.'s assertion of the psychologist-patient privilege or erred in accepting B.R.'s guarding ad litem's assertion of the privilege. See *In re Guardianship of Escola* (1987), 41 Ohio App.3d 42, 46.

Mr. King also asserts that the trial court erred when it prevented him from presenting the testimony of Dr. McPherson on surrebuttal. A previously noted, the admission and exclusion of relevant evidence is within the discretion of the trial court. Moreover, "[t]he denial of surrebuttal testimony by a criminal defendant lies solely within the discretion of the trial court [and a] court does not, *ipso facto*, abuse its discretion in denying a criminal defendant the opportunity to present surrebuttal testimony." (Citation omitted.) *State v. Spirko* (1991), 59 Ohio St.3d 1, 28. After reviewing the record, we cannot conclude that the trial court acted with passion, prejudice or the like in excluding the testimony of Dr. McPherson. Moreover, even if the trial court had erred in excluding Dr. McPherson's testimony on surrebuttal, Mr. King was allowed to present other testimony

on surrebuttal, and based on the weight of the other evidence produced at trial, any error is harmless. Mr. King's second and fourth assignments of error are overruled.

C.

Third Assignment of Error

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED THE STATE OF OHIO TO INTRODUCE EVID.R. 404(B) PRIOR BAD ACTS EVIDENCE AGAINST THE APPELLANT DESPITE A FAILURE OF THE STATE TO SUBSTANTIALLY DEMONSTRATE THAT THE APPELLANT COMMITTED THE ALLEGED PRIOR BAD ACT AND A LACK OF EVIDENCE DEMONSTRATING A DEFINITIVE IDIOSYNCRATIC PATTERN OF CONDUCT BETWEEN THE ALLEGED ACTS.

Mr. King asserts that the trial court erred by admitting testimony concerning his sexual abuse of D.A. because there was not substantial evidence that the committed the acts; moreover, the acts were not sufficiently connected to the crime charged. We disagree.

As noted above, a trial court's decision regarding the admission of evidence is reviewed under the abuse of discretion standard.

Generally, evidence of prior criminal acts, wholly independent of the crime for which defendant is on trial, is inadmissible. *State v. Thompson* (1981), 66 Ohio St.2d 496, 497. R.C. 2945.59 codifies the exceptions to this rule, providing:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system is doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Evid. R. 404(B) states that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evid. R. 404(B) is in accord with R.C. 2945.59. *State v. Broom* (1988), 40 Ohio St.3d 277, 281. "The issue of

identity, although not listed in the statute, has been held to be included within the concept of scheme, plan, or system. " *Id.* Hence, it is necessary to determine whether any of the matters

enumerated in R.C. 2945.59 were relevant at trial and, if so. whether the testimony that the prosecution elicited regarding other acts of the defendant tended to prove the relevant enumerated matter. *State v. Curry* (1975), 43 Ohio St. 2d 66, 70.

"Because R. C. 2945.59 and Evid. R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *Broom*, 40 Ohio St.3d at paragraph one of the syllabus. Moreover, evidence of other acts by a defendant is only admissible when it tends to show one of the matters enumerated in the statute and only when the evidence offered is relevant to prove the defendant is guilty of the offense in question. *State v. Burson* (1974), 38 Ohio St.2d 157, 158. Finally, the state must "offer[] substantial proof that the alleged similar act was committed by the defendant." *State v. Carter* (1971), 26 Ohio St.2d 79, paragraph two of the syllabus.

Mr. King asserted as part of his defense that B.R. had committed the crimes that he was accused of, putting identity at issue. Hence, as the alleged abuse of D.A. was close in time, as well as similar in execution, to the abuse of Y.E. , we conclude that the trial court did not abuse its discretion by admitting testimony concerning the alleged abuse of D.A. as it was relevant evidence of Mr. King's identity in this case.

Mr. King also asserts that the trial court erred in concluding that substantial evidence was produced by the state showing that he had committed the acts on D.A. After reviewing the testimony before the trial court which implicated Mr. King in the abuse of D.A., we conclude that the trial court did not err in concluding that substantial evidence existed showing that Mr. King committed the acts upon D. A. Mr. King's third assignment of error is overruled.

III.

Mr. King's four assignments of error are overruled The verdict of the Medina County Court of Common Pleas is affirmed.

Judgement affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, Directing the Court of Common Pleas, County of Medina, to carry this judgement into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R.27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(e).

Costs taxed to Appellant.

Exceptions

/s/_____
WILLIAM G. BATCHELDER
FOR THE COURT

REECE, J.
CONCURS

CARR, P.J.
CONCURS IN JUDGMENT ONLY

(Reece, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Section 6(C), Article IV, Constitution.)